
OPINION OF THE PUBLIC ACCESS COUNSELOR

EDWARD R. BAY
Complainant,

v.

CITY OF BEDFORD,
Respondent.

Formal Complaint No.
21-FC-64

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the City of Bedford violated the Access to Public Records Act.¹ Attorney James Pittman filed an answer on behalf of the City. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on June 7, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to records concerning a subdivision development that is allegedly affecting the complainant's property.

On April 26, 2021, Edward R. Bay (Complainant) filed a public records request with the Office of the Mayor for the City of Bedford seeking the following:

1. Pursuant to Bedford Indiana Code 152.4 The Developer at Broadview North Subdivision was required to submit plans for approval: It shall be the responsibility of the subdivider of every proposing subdivision to have a complete set of construction plans prepared by an engineer including profiles, cross-sections, specifications., and other supporting data for all required public streets, utilities, and other facilities." I would like a copy of those plans.
2. I would like a copy of the permit application and the actual permit for Broadview North Subdivision.
3. I would like a copy of the Rule 5 Permit as required by IDEM.
4. I would like a copy of the performance bond as required by the City of Bedford.
5. ...I would like a copy of all BPD [Bedford Police Department] records with my name on them.

Bay alleges the City is violating the public access laws and delaying production of documents.

In turn, Bay filed his complaint on June 7, 2021.

On June 28, 2021, the City filed a response denying all of Bay's allegations. The City argues it has provided all available documents that are responsive to Bay's request and continues to supplement its initial response with documentation as it becomes available.

As for the BPD documents, the City contends that it produced the records on May 4, 2021.

Notably, the City asserts that it is not in receipt of copies of construction plans for the subdivision; a Rule 5 permit was not required and therefore does not exist; and records relating to the performance bond information vis-à-vis letters of credit extended to the developer.

When this office reached out to Bay to confirm, he acknowledged receipt of 89 documents, but claims they are not responsive to his request. He did not raise objection to the BPD documents.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. City of Bedford (City) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2. Bay's requests

The crux of this dispute revolves around the portions of Bay's requests concerning plans, permits, and bonds and the City's assertion that it does not have those documents.

It is true that Bedford City Ordinance 152.40(B)(2) states:

The final construction plans shall be based on preliminary plans which have been approved with the preliminary plat and shall be prepared and submitted in conjunction with the final plat.

Indeed, this ordinance would lead a member of the community to infer the City received these plans and rightfully so. The City affirmatively states, however, that it does not have copies of the developer's plans.

With a few notable exceptions not relevant here, APRA only requires a public agency to produce records existing and the time of the request and not seek out or create them. This office does not have jurisdiction in enforcing a local ordinance; and thus, if the City does not have the plans in its possession, it does not have to produce them. If it does receive them in the future, the City must produce them.

Similarly, the dispute that a “Rule 5 Permit” was not required by IDEM and therefore does not exist in the City’s possession. The City is not obligated to provide a record that does not exist.

Finally, the City provided an updated letter of credit to Bay on June 1, 2021, which was previously unavailable. This was to supplement the request for the performance bond.

It is unclear under what circumstances the local plan commission requires an actual performance bond for developer projects. Again, if a document does not exist, it does not have to be produced pursuant to a public records request.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the City of Bedford did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor